IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
January 30, 2007 Session

STATE OF TENNESSEE v. ARIEL BEN SHERMAN & JACQUELINE P. CRANK

Appeal from the Criminal Court for Loudon County
No. 10,611A&B E. Eugene Eblen, Judge

No. E2006-01226-CCA-R3-CD - Filed July 12, 2007

The State of Tennessee appeals the Loudon County Criminal Court's dismissal of an indictment that alleged in one count child abuse and neglect against the defendants, Jacqueline P. Crank and Ariel Ben Sherman. The State presents two questions: (1) whether a 2005 change in the proscriptive statute "decriminalized" the defendants' 2002 conduct as alleged in the indictment and (2) whether defendant Sherman could be criminally liable for the neglect of the victim based upon his relationship – or lack thereof – with the minor victim or her mother, defendant Crank. Because the trial court erred in using both bases, respectively, to dismiss the indictment, we reverse as to both defendants and remand the case to the trial court.

Tenn. R. App. P. 3; Judgment of the Criminal Court is Reversed and Remanded.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JERRY L. SMITH, J., joined.

Robert E. Cooper, Jr., Attorney General & Reporter; Elizabeth B. Marney, Assistant Attorney General; Scott McCluen, District Attorney General; and Frank Harvey, Assistant District Attorney General, for the Appellant, State of Tennessee.

Don Bosch and Lisa B. Hatfield, Knoxville, Tennessee, for Appellee, Ariel Ben Sherman; and Gregory Issacs, Knoxville, Tennessee, for the Appellee, Jacqueline P. Crank.

OPINION

The few facts developed in the record indicate that the defendants were charged in 2002 with violating Tennessee Code Annotated section 39-15-401, which at the time of the alleged offenses, proscribed "knowingly, other than by accidental means, treat[ing] a child under eighteen (18) years of age in such a manner as to inflict injury or neglect[ing] such a child so as to adversely affect the child's health and welfare." T.C.A. § 39-15-401(a) (2003) (amended Public Acts ch. 487, effective July 1, 2005). The indictment alleged that the offense occurred between February 4, 2002,

and June 24, 2002. The victim of the alleged child abuse or neglect was Jessica Crank, who was apparently 14 or 15 years of age at the time of the acts or omissions upon which the indictment was based.[1] Motions contained in the record reflect that Jessica Crank was the daughter of the defendant Jacqueline P. Crank and that defendant Ariel Ben Sherman was a minister in the Universal Life Church. Furthermore, the defendants admitted in motions filed in the trial court that, sometime after February 4, 2002, the victim was diagnosed as suffering from "Ewing's Sarcoma," that defendant Crank "chose to rely upon spiritual treatment as opposed to taking her child to the University of Tennessee [Medical Center] Emergency Room," and that "Ewing's Carcinoma" resulted "in the untimely death" of the victim.

Sustaining motions filed by the defendants, the trial court dismissed the indictment. As a basis for dismissing the charge against defendant Sherman, the trial court found merely that no evidence existed to establish a marital relationship between defendants Crank and Sherman. As to both defendants, the trial court ruled that a 2005 amendment to Code section 39-15-401 effectively obliterated the 2002 offense as charged by the State. The 2005 version of section 39-15-401 provides in pertinent part:

> (a) Any person who knowingly, other than by accidental means, treats a child under eighteen (18) years of age in such a manner as to inflict injury commits a Class A misdemeanor; provided, however, that, if the abused child is six (6) years of age or less, the penalty is a Class D felony.
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> (b) Any person who knowingly abuses or neglects a child under thirteen (13) years of age, so as to adversely affect the child's health and welfare, commits a Class A misdemeanor; provided, that, if the abused or neglected child is six (6) years of age or less, the penalty is a Class E felony.

T.C.A. § 39-15-401(a), (b) (Supp. 2005).[2]

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[1] A defense motion in the record recites the arrest warrants, which stated the victim's date of birth to be April 24, 1987.

[2] Prior to the July 1, 2005, the effective date of the 2005 amendment, Tennessee Code Annotated section 39-15-401(a) provided in pertinent part:

> (a) Any person who knowingly, other than by accidental means, treats a child under eighteen (18) years of age in such a manner as to inflict injury or neglects such a child so as to adversely affect the child's health and welfare commits a Class A misdemeanor; provided, however, that if the abused or neglected child is six (6) years of age or less, the penalty is a Class D felony.

(continued...)

On appeal, the State claims that a statutory savings statute, Tennessee Code Annotated section 39-11-112, precluded the dismissal of the indictment that was based upon the 2005 amendment to Code section 39-15-401. It also claims that the trial court erred in law by alternatively dismissing the charge against defendant Sherman because he was not married to defendant Crank.

I. Standard of Review

The parties advance the proposition that the standard of review applicable to a trial court's dismissal of the indictment is abuse of discretion. *See State v. Harris*, 33 S.W.3d 767, 769 (Tenn. 2000) (citing *State v. Benn*, 713 S.W.2d 308, 311 (Tenn. 1986)); *see also Benn*, 713 S.W.2d at 311 (discussing dismissal of indictments by the trial court pursuant to Tennessee Rule of Criminal Procedure 48(b), which authorizes a trial court to dismiss a charge upon finding an "unnecessary delay" in prosecuting the charge). In the present case, however, the trial court's decision and our review thereof are based upon questions of law, which are reviewed on appeal de novo. *State v. Thompson*, 197 S.W.3d 685, 690 (Tenn. 2006). Accordingly, we will review the questions raised in this appeal "de novo with no presumption of correctness given to the trial court's conclusions." *Id*.

II. The Effect of the 2005 Amendments to Tennessee Code Annotated Section 39-15-401

The trial court agreed with the defendants' claim that the legislature "decriminalized" their 2002 acts or omissions alleged in the indictment when, in 2005, it modified the offense of child neglect to apply only to victims under age 13. The defendants' theory was premised on the State's bill of particulars in which the assistant district attorney general stated, "The actions that the State allege[s] constitute the offense in question are the failure by either defendant to pursue the medical evaluations and treatments recommended by the [c]hiropractor and the persons at Physician's Care." Based upon this statement and the State's similar position espoused in the motion-to-suppress hearing, the defendants posited that the theory of the offense was child neglect, not child abuse. Furthermore, we note that the State, in its appellate brief, does not dispute that the mode of the offense was child neglect, an offense which in 2005 was proscribed via Code section 39-15-401(b). *See* T.C.A. § 39-15-401(b) (Supp. 2005) (proscribing as a Class A misdemeanor abuse or neglect of any child under thirteen years of age but over 6 years of age "so as to adversely affect the child's health and welfare") (amended 2006 Pub. Acts ch. 939).

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[2](...continued)

This subsection was replaced by subsections (a) and (b) in the 2005 act. In 2006, in Public Acts chapter 939, the legislature again amended the statute by changing subsection (b) to read:

> (B) Any person who knowingly abuses or neglects a child under eighteen (18) years of age, so as to adversely affect the child's health and welfare, commits a Class A misdemeanor. . . .

T.C.A. § 39-15-401(b) (2006).

The State posits on appeal that Tennessee Code Annotated section 39-11-112 saves the prosecution despite the enactment of the 2005 act. Section 39-11-112 provides:

> Whenever any penal statute or penal legislative act of the state is repealed or amended by a subsequent legislative act, any offense, as defined by the statute or act being repealed or amended, committed while such statute or act was in full force and effect shall be prosecuted under the act or statute in effect at the time of the commission of the offense. Except as provided under the provisions of § 40-35-117, in the event the subsequent act provides for a lesser penalty, any punishment imposed shall be in accordance with the subsequent act.

T.C.A. § 39-11-112 (2006).

First, we turn to the defendants' argument that, but for the savings statute, *Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519 (2004), affords the defendants the benefit of the legislature's post-offense narrowing of the scope of the offenses. In *Schriro*, the Supreme Court said that "[n]ew *substantive* rules generally apply retroactively, . . . includ[ing] decisions that narrow the scope of a criminal statute by interpreting its terms . . . ." *Schriro*, 542 U.S. at 351, 124 S. Ct. at 2522 (citing *Bousley v. United States*, 523 U.S. 614, 620-21, 118 S. Ct. 1604, 1610 (1998)). The court instructed, "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Schriro*, 542 U.S. at 353, 124 S. Ct. at 2523 (citing *Bousley*, 523 U.S. at 620-21, 118 S. Ct. at 1604). Although we have no quarrel with the defendants' characterization of the 2005 amendment to Code section 39-15-401 as substantive (as it would have applied to the 14 or 15-year-old victim), we nevertheless disagree that *Schriro* governs the present case, even if the savings statute does not apply.

Schriro adjudicated the claim that the right-to-jury-trial pronouncements in the prior decision of *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002), applied to Schriro, despite that Schriro's case had become final on direct appeal before *Ring* was decided. *Schriro*, 542 U.S. at 350, 124 S. Ct. at 2522. Thus, *Schriro* addressed the *impact of a judicial decision on existing statutory provisions* for judge-sentencing; it did not involve the *amendment* of statutory provisions. *Schriro* spoke of a "new rule" that emanates from "a decision of [the] Court"; when it spoke of the retroactivity of a new substantive rule that "narrow[ed] the scope of a criminal statute," it referred to the narrowing that resulted from a court's "interpreting [the] terms" of the statute. *Id.* Also, *Schriro* cited *Bousley* for the propositions that the defendants now tout, but *Bousley* addressed the retroactive effect of a prior High Court *decision* that had narrowed the definition of "'using'" a firearm during a federal drug trafficking crime. *See Bousley*, 523 U.S. at 616, 118 S. Ct. at 1608. The drug trafficking proscriptive statute had not been amended by the Congress.

The distinction is noteworthy. A judicial decision that interprets existing statutory language invites an understanding that the language had always conveyed the newly elucidated

meaning, despite that no one had previously recognized it. Such an interpretative function naturally evokes questions like "How far do we go back in recognizing the interpretation?" A statutory amendment that narrows a scope of offending, however, is premised upon an actual change in the language. Thus, we conclude, that *Schriro* and *Bousely* do not control the present case.

Second, we address the claim that *Bell v. Maryland*, 378 U.S. 226, 84 S. Ct. 1814 (1964), expresses a common law rule that supports the defendants' position. In *Bell*, the Maryland legislature had substantively amended the underlying criminal statutes after the petitioners' convictions had become final. *Bell* discussed the common law rule "that a party cannot be convicted, after the law under which he may be prosecuted has been repealed, although the offence may have been committed before the repeal." *Bell*, 378 U.S. at 230-31, 84 S. Ct. at 1817. The Court noted that the rule applies "to any such proceeding which, at the time of the supervening legislation, has not yet reached final disposition in the highest court authorized to review it." *Id.*

Having made this point, however, the defendants aptly concede that, generally, common law may be abrogated by statutory enactments, although they disagree that the Tennessee savings statute was effective to abrogate the common law rule described in *Bell*. On this point, the defendants claim that the "exception" in the savings statute applies. The "exception" to the savings statute is when "the subsequent act provides for a lesser penalty, [in which case] any punishment imposed shall be in accordance with the subsequent act." T.C.A. § 39-11-112. Asserting that the penalty for neglecting a child 13 years of age or older is "zero" under the 2005 act, they argue that the 2005 act imposes a "lesser penalty" for neglect of such a child than was provided in the pre-2005 statute. Although the argument is innovative, we reject it. As applicable to the present case, the penalties prescribed in both versions of Code section 39-15-401 are the same; the offense is sanctioned under both versions as Class A misdemeanors. Thus, despite the defendants' claim that the 2005 amendment "reduced" the punishment for neglect of a 13-to-17-year-old child to zero, the "exception" clause to the savings statute is not in play in the present case. The issue presented – one that we have adjudicated above – is whether the defendants may benefit from the legislature's 2005 narrowing of the scope of the offense of child neglect, not by whether acts or omissions outside the new, narrower scope are subject to a lesser degree of punishment.

We hold, therefore, that the savings statute, Code section 39-11-112, is effective to abrogate any common law rule that would have compelled dismissal of the indictment in the present case. In this vein, our supreme court has said, "Generally, statutes are presumed to apply prospectively in the absence of clear legislative intent to the contrary." *State v. Thompson*, 151 S.W.3d 434, 442 (Tenn. 2004). Nothing in the text of the 2005 amendment to Code section 39-15-401 indicates that the legislature intended it be applied retrospectively. "[H]ad the legislature intended to depart from the long-established rule that statutes are presumed to apply prospectively, it could have so indicated." *Id.*; *see also State v. Odom*, 137 S.W.3d 572, 582 (Tenn. 2004).

In summary, Code section 39-11-112 clearly provides that the defendants were subject to prosecution pursuant to the provisions of Code section 39-15-401 that prevailed in 2002. Accordingly, the trial court's determination of law on this point is reversed.

III. Defendant Sherman's Liability for Conviction of Child Neglect

We now turn to the trial court's alternative basis for dismissing the charge against defendant Sherman – that he had no relationship with defendant Crank that obliged him to seek medical assistance for the victim.

Defendant Sherman urges that any criminal liability for child neglect must be predicated upon the existence of a duty owed by him to the victim.

A. Viability of a Vicarious Liability Theory of the Offense

Initially, we express doubt that the State was obliged to allege and show a duty of defendant Sherman as a means of defeating what was in effect a summary judgment of dismissal. The State apparently could have theorized that Sherman was merely complicit in defendant Crank's neglect of her child, the victim. "A person is criminally responsible for an offense committed by the conduct of another if . . . [, a]cting with intent to promote or assist the commission of the offense, . . . the person . . . aids, or attempts to aid another person to commit the offense . . . ." *See* T. C.A. § 39-11-402(2) (2006). We acknowledge that the State may have ignored this theory in its bill of particulars, in which it stated, "With regard to defendant Sherman, it is the State's position that he repeatedly held himself out as [the victim's] father and one of her caretakers, *thereby creating a duty on his part as well*." (Emphasis added.) Thus, did the State, through its bill of particulars, necessarily forfeit a non-duty-based theory that defendant Sherman neglected the victim?

At this juncture, we acknowledge that "[t]he State may not press [its] prosecution on a theory upon which the defendant has not been informed or has been misled." *State v. Wilcoxson*, 772 S.W.2d 33, 39 (Tenn. 1989). The extent to which the State is bound by a bill of particulars, however, is primarily a function of notice. Specifically, the purpose of a bill of particulars is to provide the defendant with adequate information about the charged offense to allow him or her "(a) to prepare a defense, (b) to avoid prejudicial surprise at trial, and (c) to enable the accused to preserve a plea of double jeopardy." *State v. Shropshire*, 45 S.W.3d 64, 71 (Tenn. Crim. App. 2000). Thus, when a case goes to trial, "[a] variance between . . . [a] bill of particulars and the evidence presented at trial is not fatal unless it is both material and prejudicial." *Id*. at 70. Moreover, the variance is not material when the indictment and proof "substantially correspond." *Id*. at 71 (citing *State v. Mayes*, 854 S.W.2d 638, 640 (Tenn. 1993)). "A material variance occurs only if the prosecutor has attempted to rely upon theories and evidence *at the trial* that were not fairly embraced in the allegations made in the charging instrument." *Id*. (emphasis added). Finally, "[i]t is not the purpose of either the indictment or the bill of particulars to adequately prove the crime or to elect among alternative legal theories" for the charged offense. *State v. Cattone*, 968 S.W.2d 277, 280 (Tenn. 1998). *Cf. State v. Goodman*, 90 S.W.3d 557, 561-62 (Tenn. 2002) (approving a pretrial motion to dismiss that "presented a question of law which was 'capable of determination without the trial of the general issue,'" when the "resolution of the defendant's motion required the

trial court to interpret a statute and apply the statute to undisputed facts," which were established by formal *stipulations*).

Based upon this line of authority, a theory of Sherman's criminal responsibility for the acts or omissions of Crank "substantially correspond[s]" to the offense charged in the indictment. "[C]riminal responsibility is not a recognizable offense in itself, but is solely a theory by which the State may hold the defendant liable for the principal offense committed by another[; an] indictment that charges an accused on the principal offense 'carries with it all the nuances of the offense,' including criminal responsibility." *State v. Lemacks*, 996 S.W.2d 166, 173 (Tenn. 1999) (citations omitted). Of course, "[a]t the conclusion of the proof by the state at trial, it may be that the defendant is entitled to a judgment of acquittal[, but] a dismissal of the indictment at this time would not be warranted." *See Cattone*, 968 S.W.2d at 280. Although, in light of the bill of particulars, the pursuit of a criminal responsibility theory at trial could engender issues of notice,

> it is only by *post hoc* examination of the matter that the court will be able to determine whether deficiencies in the bill of particulars prevented the defendant from preparing an adequate defense, caused undue and prejudicial surprise, or made untenable a later plea of double jeopardy. In other words, the trial court cannot determine whether or not the defendant has been hampered in his defense until the court knows what proof the state will offer . . . and how this evidence relates to the actual theory of defense. Generally, none of this will be apparent until the case has been tried.

State v. Byrd, 820 S.W.2d 739, 741 (Tenn. 1991). Therefore, although the defendant may yet press an issue of notice, *see Lemacks*, 966 S.W.2d at 173, the State was not immutably resigned to a "duty" theory of prosecution of defendant Sherman *at the point* the trial court dismissed the indictment against him on the grounds that the indictment, coupled with the bill of particulars, failed to factually allege an offense. Thus, in view of the viability of a complicity theory of the offense, the trial court's dismissal of the charge against the defendant Sherman was, at best, premature.

B. Duty-Based (Non-Vicarious) Theory of Offense

Even assuming that the bill of particulars locked the State into a theory that defendant Sherman had a duty to avoid the neglect of the victim, we are unconvinced that the basis for dismissal of the charge against him was legally sound. The factual premise urged by Sherman and unchallenged by the State was that Sherman was not married to defendant Crank, with the inference that, in the absence of the defendants' being married, Sherman owed no duty to the victim. Although the absence of a marital union is uncontroverted, the inference is inapt and unavailing.

We agree that, on the issue of principal criminal liability, the concept of neglect entails an element of duty. "Neglect" is semantically related to "negligence." *See* Webster's New Word Dictionary 952 (2d. ed. 1986) (equating "neglectful" to "negligent"). This court has said,

"Much of [the] law of negligence has developed in the civil law of torts, which serves as a backdrop for understanding the principles that govern criminal negligence. . . . Thus, certain concepts of negligence as used in our tort law inform the analysis" of negligence in the criminal realm. *State v. Roger Hostetler*, No. 02C01-9707-CC-00294, slip op. at 9 (Tenn. Crim. App., Jackson, Mar. 27, 1998).[3] A standard of care, which is central to the concept of negligence, "signals the existence of a duty imposed upon one person to avoid doing harm to another person." *Id*., slip op. at 10. "Duty" depends upon the "foreseeable probability of the harm or injury occurring." *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995). "Under our tort law, a standard of care equates to a 'scope of a duty' to another person to avoid an unreasonable risk of harm to the other person." *Roger Hostetler*, slip op. at 10. "[D]uty is the legal obligation owed by defendant to plaintiff to conform to a reasonable person standard of care for the protection against unreasonable risks of harm." *McCall*, 913 S.W.2d at 153.

Ultimately, the question is: When does a potentially neglected child fall within a person's scope of duty? In the present case, we start with the insight that the absence of a marriage between defendants Sherman and Crank does not *per se* equate to an absence of duty of Sherman to the victim. In a title governing juveniles, our code provides that "dependent and neglected" may refer to a child who merely suffers from neglect. T.C.A. § 37-1-102(b)(12)(G) (2005). Such a child is one, *inter alia*, "[w]hose parent, guardian or custodian neglects or refuses to provide necessary medical, surgical, institutional or hospital care for such child . . . ." *Id.* § 37-1-102(b)(12)(D). We believe this statute is useful in determining whether defendant Sherman may have owed a duty to the victim. Specifically, we hold that his scope of duty could embrace any children of whom he was the father, guardian, or custodian. None of these rubrics are defined by a marital relationship with a child's parent.

Although guardianship entails a formal legal relationship, *see id.* § 34-1-101(11) (2001) (defining "guardian" as "a person . . . *appointed by the court* to provide partial or full supervision, protection and assistance of the person or property or both of a minor") (emphasis added), the term "custodian" may denote a de facto, less formal relationship. It refers, *inter alia*, to a "person, other than a parent or a legal guardian, who stands in loco parentis to the child. . . ." *Id.* § 37-1-102(b)(7).

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[3] The general provisions for culpability in our criminal code state,

> "Criminal negligence" refers to a person who acts with criminal negligence with respect to the circumstances surrounding that person's conduct or the result of that conduct when the person ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.

T.C.A. § 39-11-302(d) (2006).

With these bearings in mind, we turn to the factual premises utilized by the trial court in the present case. The State's bill of particulars said, "[I]t is the State's position that [defendant Sherman] repeatedly held himself out as [the victim's] father and one of her caretakers . . . ." In the hearing on the motion to dismiss, the assistant district attorney general stated, "[T]he State is not alleging, and will not attempt to prove, and as far as I know, could not prove that [defendant Sherman] was ever lawfully married to the mother of this child, that he ever adopted the child, that he is the stepfather, or any way legally connected in that manner." The State maintained in the hearing that although defendant Sherman had "held himself out as the father" of the victim, the State was not claiming that "he held a legal position as father, guardian or the like to that child." Defendant Sherman's attorney briefly referred to the State's acknowledgment that "Sherman was not in any way lawfully married to Jacqueline Crank," and the trial court expeditiously sustained from the bench defendant Sherman's motion to dismiss based upon his lack of a relationship with the victim. On this point, the trial court's written order of dismissal of defendant Sherman's neglect charge stated, "The [S]tate has conceded that there is no evidence that Defendant Sherman was ever married to Defendant Crank. The [i]ndictment as to Ariel Ben Sherman is dismissed with prejudice."

Construing the State's comments at the hearing as concessions that defendant Sherman bore no "legal" relationship to the victim, the record arguably shows that he was neither the victim's guardian nor her father. Nothing in the record, however, addresses whether he occupied the more informal role of a custodian of the victim. Moreover, the State's bill of particulars includes the description "caretaker" in referring to defendant Sherman's relationship with the victim. Still, the trial court's order does not address the *in loco parentis*, or custody, issue. Accordingly, we hold upon our de novo review that the record does not support the trial court's decision to alternatively dismiss the charge against defendant Sherman. The issue litigated below simply did not foreclose the possibility that the prosecution of defendant Sherman is supportable on other bases implicating his duty to the victim.

IV. Conclusion

Based, therefore, upon the foregoing analyses, we reverse the order of the trial court in its entirety and remand the case for further proceedings upon the indictment.

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JAMES CURWOOD WITT, JR., JUDGE